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Failing to See the Wood for the Trees: Chronic Sexual Violation and Criminal Law

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journals.sagepub.com/home/clj**Tanya Palmer**

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Abstract

This article argues that sexual violation can take both ‘chronic’ and ‘acute’ forms. The latter, encapsulated by the offences of rape and sexual assault, refers to a discrete incident in which a victim’s sexual autonomy is violated. By contrast, the article articulates an original concept of ‘chronic sexual violation’, in which the victim’s autonomy is gradually eroded over a longer period of time, for example in an abusive relationship. In such a case it may be difficult to identify specific sexual encounters as non-consensual, and yet the victim is left with little or no control over whether and on what terms they engage in sexual activity. This conceptualisation builds on Evan Stark’s theory of coercive control, and is grounded in survivor accounts of the lived experience of sexual violation within ongoing relationships drawn from existing studies of abusive relationships, my own empirical interview data, and case law. The article contends that the limitations of law and policy responses to sexual violation within relationships can be partly explained by the illegibility of chronic sexual violation within a legal framework premised on the notion that a crime is a discrete incident. The concept of chronic sexual violation offers a way forward for crafting legal responses to this specific and pervasive form of harm, while resisting hierarchical constructions of sexual violation within intimate relationships as less serious than ‘real rape’.

Keywords

Rape, chronic sexual violation, sex offences, coercive control, domestic abuse, grooming, *F v DPP*, course of conduct crimes

Introduction

In this article I argue that sexual violation can take both chronic and acute forms, and that while the former is relatively well understood, theory and law have been slow to recognise the latter and have done so only in a limited way. I begin by outlining acute sexual violation as the framework which dominates

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social and legal understandings of sexual violence. This framework marginalises more diffuse, ongoing processes of sexual violation common to abusive intimate relationships as well as a range of other contexts. However, as I explore below, there is a tension between efforts to articulate the distinctiveness of these experiences without casting sexual violation by partners as less serious than ‘real rape’. My answer to this dilemma is to articulate an original concept of ‘chronic sexual violation’, envisaged as different from, but no less serious than, acute sexual violation. I use coercive controlling relationships as a case study through which to develop this concept, building on Stark’s theory of coercive control,¹ and grounding the concept in an analysis of accounts of intimate partner sexual violence drawn from the extant literature, my own empirical research and relevant case law. While my initial focus is on partners, a key argument is that chronic sexual violation cuts across a range of contexts, and I identify various examples throughout. In the final section I analyse several recent legal developments in the sphere of domestic and sexual violence, arguing that these demonstrate an embryonic recognition of chronic sexual violation which is hampered by the traditional construction of criminal liability centring on a single, discrete act of wrongdoing.

Rape as a Crime of Acute Sexual Violation

Historically, rape has been both socially and legally constructed as a crime of acute sexual violation. The stereotypical image of rape involves a one off attack by a man who is a stranger to the female victim, in an outside location, using a weapon and/or a level of brutal violence beyond that inherent in the act of non-consensual penetration itself, which is resisted by the victim to the utmost.² In the three decades since Susan Estrich articulated this stereotype of the ‘real rape’ and the way it operates as an obstacle to legal recognition of other rape experiences—particularly date and acquaintance rape—the stereotype has been the subject of considerable scrutiny and challenge.³ Research has demonstrated that rape is most commonly perpetrated by men known to the victim, particularly partners and ex-partners,⁴ that non-consensual penetration does not necessarily involve the use of physical force or injury,⁵ and that it is common for victims not to fight back, either because they freeze in fright or because they submit in order to avoid more serious injury or death.⁶ Courts and legislatures in a number of jurisdictions have also responded to criticism of the ‘real rape’ stereotype by expanding legal definitions of rape to incorporate male and non-binary victims, rape within marriage, and to remove requirements of physical force.⁷

One aspect of the stereotypical rape that has not been explicitly addressed or subject to this level of scrutiny is the assumption that rape constitutes an acute form of sexual violation. In using this term I draw on medical understandings of an acute illness, symptom etc as being of rapid onset and short duration, an episode of crisis in which the patient is in serious and immediate danger, as well as more general uses of ‘acute’ to refer to a situation that is severe, intense and urgent. Thus when I refer to acute

1. Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (OUP, New York 2009).

2. Susan Estrich, *Real Rape* (Harvard University Press, Cambridge 1988).

3. See, eg, Liz Kelly, Jo Lovett and Linda Regan, *A Gap or a Chasm?: Attrition in Reported Rape Cases* (Home Office Research, Development and Statistics Directorate, London 2005); Jennifer Temkin and Barbara Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing, Oxford 2008); Miranda Horvath and Jennifer Brown (eds), *Rape: Challenging Contemporary Thinking* (Routledge, Abingdon 2009); Louise Ellison and Vanessa E Munro, ‘Better the Devil You Know? “Real Rape” Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberations’ (2013) 17 E&P 299; Hannah Bows and Nicole Westmarland, ‘Rape of Older People in the United Kingdom: Challenging the “Real-Rape” Stereotype’ (2017) 57 Brit J Criminol 1.

4. Office for National Statistics, ‘Sexual Offences in England and Wales: Year Ending March 2017’ (8 February 2018) Newport.

5. Ibid; Janice Du Mont and Deborah White, *The Uses and Impacts of Medico-Legal Evidence in Sexual Assault Cases: A Global Review* (World Health Organisation, Geneva 2007).

6. Jessica Woodhams and others, ‘Behavior Displayed by Female Victims during Rapes Committed by Lone and Multiple Perpetrators’ (2012) 18 *Psychol. Public Policy Law* 415.

7. See Clare McGlynn and Vanessa E Munro (eds), *Rethinking Rape Law: International and Comparative Perspectives* (Routledge-Cavendish, Abingdon 2011) for an overview of recent developments in a range of jurisdictions.

sexual violation I mean an identifiable event or encounter in which one person's sexual autonomy is violated by another, as in the crime of rape. As I explore further below, an acute incident can be contrasted with a chronic condition, which is long term and/or continuous. An acute incident need not be a one-off. Just as a patient can experience multiple episodes of acute illness, a person can experience multiple acute violations of sexual autonomy throughout their lifetime. Indeed it is not uncommon for an individual to be raped multiple times in their life either by the same perpetrator or by multiple different perpetrators.⁸ My central argument is that there is an alternative form of sexual violation—*chronic* sexual violation—in which the victim suffers a long term erosion of sexual autonomy, which can be distinguished from a series of acute violations.

The idea of a rape as an acute incident is fundamental to the way rape is defined. Rape in contemporary English law is constructed as a specific type of sexual assault. Assault crimes protect bodily autonomy via the prohibition of non-consensual bodily contact. Thus the starting point for investigating and prosecuting assault is the identification of a specific instance of physical contact (or the threat thereof)—the relevant form of physical contact being penile penetration in the case of rape. This act can then be evaluated in terms of the circumstances in which it took place (was it consensual?) and the defendant's state of mind (did D intend the penetration? Did D reasonably believe the complainant was consenting?) Assault crimes, including rape, are framed as discrete incidents and are not designed to address ongoing patterns of violence or abuse, or cumulative harms.⁹

The idea of rape as an acute form of sexual violation is further strengthened by the way that consent has been analysed and applied. Under s 74 of the Sexual Offences Act 2003 (SOA), 'a person consents if he agrees by choice, and has the freedom and capacity to make that choice'. This potentially allows for a wide range of circumstances to undermine an apparent agreement. However, much of the legal and philosophical literature exploring the forms of coercion that could vitiate an ostensible consent focuses on force, threats or inducements used immediately prior to the sexual activity.¹⁰ The limited temporal focus of legal understandings of consent is reflected in legislation through the conclusive and evidential presumptions contained in the 2003 Act, which are concerned with the use of tactics such as violence, threats and stupefying agents 'at the time of the relevant act or immediately before it began'.¹¹ Feminist analyses of consent have drawn attention to more subtle ways in which freedom to choose can be restricted by structural power relations¹² and by constraints at the interpersonal and community level.¹³ Yet, as I've argued elsewhere, these analyses are often reframed in the mainstream literature as simplistic and absolutist claims that all sex under patriarchy is rape.¹⁴ This allows more nuanced contextualisation of consent to be sidelined.

I am not seeking, in this article, to challenge the idea that a rape is a single identifiable instance of penetrative sexual contact in which the victim's sexual autonomy is violated. To suggest that rape could

8. Andy Myhill and Jonathan Allen, *Rape and Sexual Assault of Women: The Extent and Nature of the Problem, Findings from the British Crime Survey* (Home Office, London 2002); Erin A Casey and Paula S Nurius, 'Trauma Exposure and Sexual Revictimization Risk: Comparisons across Single, Multiple Incident, and Multiple Perpetrator Victimization' (2005) 11 *Violence Against Women* 505.

9. Indeed, some of the leading cases on non-sexual assaults demonstrate the inadequacy of this type of offence for addressing ongoing courses of conduct, see *R v Ireland* [1998] AC 147 (HL).

10. See, eg, the discussion of threats in David Archard, *Sexual Consent* (Perseus, New York 1997).

11. Sexual Offences Act 2003 (SOA 2003), s 75.

12. Catherine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard, Cambridge 1989).

13. Nicola Lacey, 'Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and Criminal Law' (1998) 11 *CJLJ* 47; Marilyn Friedman, *Autonomy, Gender, Politics* (OUP, New York 2003); Rosemary Hunter and Sharon Cowan (eds), *Choice and Consent: Feminist Engagements with Law and Subjectivity* (Routledge-Cavendish, Abingdon 2007); Vanessa E Munro, 'Constructing Consent: Legislating Freedom and Legitimizing Constraint in the Expression of Sexual Autonomy' (2008) 41 *Akron L Rev* 923; Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, And Law* (OUP, Oxford 2013).

14. Tanya Palmer, 'Distinguishing Sex from Sexual Violation: Consent, Negotiation and Freedom to Negotiate' in Alan Reed and others (eds), *Consent: Domestic and Comparative Perspectives* (Routledge, Abingdon 2017) 15.

be prosecuted without identifying a specific sexual encounter would be to completely reimagine this crime and the way that criminal responsibility for rape is assigned. Rather, I contend that in addition to the acute instances of sexual violation encompassed by the crime of rape, it is possible to identify a form of sexual violation that is chronic. This is most salient in the context of abusive intimate relationships. I therefore use coercive control as a case study through which to develop a distinct concept of chronic sexual violation.

Rape Is Rape, or Is It? The Dilemma of Conceptualising Sexual Violation in Coercive Controlling Relationships

Historically, sexual violation within intimate relationships has received only limited recognition, both legally and socially, despite being the most common context for rape.¹⁵ For example, rape within marriage was not recognised as a crime in England and Wales until 1991.¹⁶ Almost 30 years later, rape within ongoing relationships rarely results in criminal sanction. This is due to a complex range of factors, most significantly low levels of reporting and high levels of victim withdrawal during the investigation stage, despite improvements in police handling of this subset of cases.¹⁷ Victims of intimate partner sexual violation have to consider the implications of pursuing criminal proceedings against a partner on their other social and family relationships, their financial stability, and not least their immediate physical safety.¹⁸ Moreover, decisions by victims and other actors within the criminal justice process are made within a cultural milieu that includes a widespread perception that sexual violation in relationships is less serious than stranger rape, a failure to grasp the ways in which free choice over one's sexual activity can be constrained by subtle and insidious relational pressures absent any infliction of physical force, and a failure to comprehend why victims do not necessarily end the relationship after an incident of sexual violation.¹⁹ At trial, the admissibility of evidence of past sexual activity between the complainant and defendant further exacerbates the difficulties of successfully prosecuting sexual offences perpetrated by partners.²⁰ These factors compound more general difficulties with accessing support and navigating the criminal justice system, which can affect all survivors in the aftermath of sexual violence.²¹

Against this backdrop, many feminists have fought for recognition of the severity and prevalence of intimate partner sexual violation, particularly rape.²² Marital rape specifically was a key focus of feminist anti-rape activism in the 1980s, before the majority of jurisdictions in the UK, US, Australia and Canada removed their marital rape exemptions in the late 1980s and 1990s.²³ Notwithstanding these reforms, as Eastaale and McOrmond-Plummer argue, 'powerful social and historical forces have worked

15. Ministry of Justice, Home Office and Office for National Statistics, 'An Overview of Sexual Offending in England and Wales' (2013).

16. *R v R* [1992] 1 AC 599 (HL) 599.

17. Katrin Hohl and Elisabeth A Stanko, 'Complaints of Rape and the Criminal Justice System: Fresh Evidence on the Attrition Problem in England and Wales' (2015) 12 *E.J.C.* 324; Marianne Hester and Sarah-Jane Lilley, 'Rape Investigation and Attrition in Acquaintance, Domestic Violence and Historical Rape Cases' (2017) 14 *J. Investig. Psychol. Offender Profiling* 175.

18. Hester and Lilley (n 17).

19. Anna Carline and Patricia Eastaale, *Shades of Grey—Domestic and Sexual Violence against Women: Law Reform and Society* (Routledge, Abingdon 2014) ch 10.

20. *R v A* [2001] UKHL 25, [2002] 1 AC 45, discussed *Ibid.*

21. Marianne Hester and Sarah-Jane Lilley, 'More than Support to Court: Rape Victims and Specialist Sexual Violence Services' (2018) 24 *Int. Rev. Vict.* 313.

22. For example, Patricia Eastaale and Louise McOrmond-Plummer, *Real Rape, Real Pain: Help for Women Sexually Assaulted by Male Partners* (Port Campbell Press, Australia 2006); David Finkelhor and Kersti Yllö, *License to Rape: Sexual Abuse of Wives* (Simon and Schuster, New York 1987).

23. Diana EH Russell, *Rape in Marriage* (Macmillan, New York 1982); 'Our Campaigns' (*Rights of Women*) <<https://rightsofwomen.org.uk/about-us/herstory/our-campaigns-2/>> accessed 5 November 2020; for discussion, see Nicola Gavey, *Just Sex?: The Cultural Scaffolding of Rape* (Routledge, Abingdon 2004) ch 2; and Carline and Eastaale (n 19) ch 10.

to keep partner rape from being named and addressed, and to keep women from seeking redress and healing'.²⁴ There are two important strands to this critique. First, that the wrongfulness and harmfulness of rape does not depend on the presence of the brutal physical violence associated with the stereotypical stranger rape.²⁵ Second, in any case, sexual assaults by partners are not less physically violent than stranger attacks and can be strikingly similar to the 'real rape' stereotype. Myhill and Allen found that partner sexual assaults were 'more than twice as likely to result in a physical injury as attacks by strangers (39% Vs 19%)',²⁶ and case law is replete with examples of men terrorising their wives and partners into submission via the use of weapons and brutal physical assaults.²⁷ There is also evidence that rape within relationships and stranger rape cause similar levels of long term psychological distress.²⁸

There is therefore a reluctance from some activists and scholars, which I share, to establish a separate legal category for relationship rape, as this risks creating a misleading hierarchy of 'real rape' and some lesser category of violation.²⁹ This resistance to classifying distinct forms of violation based on the relationship between the perpetrator and victim sits in tension with an increasing awareness of the specificity of intimate partner sexual violence, and a need to articulate this specificity in order to tailor legal and policy interventions accordingly. This is exemplified by Stark's claim that 'rape in abusive relationships has little in common with stranger rape'.³⁰ Sexual violation within relationships needs to be contextualised in order to address some of the barriers to recognition outlined above, such as the particular practical constraints faced by this group of victims.³¹ Moreover, a focus on demonstrating how sexual violation in coercive controlling relationships fits into the existing structure of the crime of rape risks obscuring and distorting a significant portion of the harm. Identifying and abstracting specific sexual encounters within a relationship that meet the criteria for rape or sexual assault can overlook their location within a broader web of controlling and sexually violating behaviours, some of which may not cross the current threshold of criminality. Ignoring the interplay between, and cumulative effect of, these behaviours can result in a failure to see the wood for the trees.

It is in response to this tension between the need to acknowledge intimate partner sexual violence as a genuine, pervasive and severe form of sexual violation alongside more stereotypical rape scenarios, and the need to articulate the specificity of sexual violation within more diffuse, longer term dynamics of coercion and control, that I propose a new category of chronic sexual violation, which can be contrasted with acute sexual violation. As explained above, 'acute sexual violation' here refers to a discrete incident in which one person's sexual autonomy is overridden by another. 'Chronic sexual violation' refers to a situation in which the victim's sexual autonomy is gradually chipped away over a longer period of time often using a more insidious web of tactics. This medicalised terminology is inspired by Stark's reference to coercive control as a 'chronic' condition,³² and was chosen because both terms have

24. Eastale and McOrmond-Plummer (n 22).

25. Estrich (n 2); see also John Gardner and Stephen Shute, 'The Wrongness of Rape' in Jeremy Horder (ed), *Oxford Essays in Jurisprudence: Fourth Series* (OUP, Oxford 2000).

26. Myhill and Allen (n 8).

27. See, eg, *R v R* (n 16) the landmark marital rape case in which, after she had moved out, the victim's husband forced his way into her parents' home and squeezed her neck with both hands while attempting to rape her, resulting in injuries severe enough for a separate conviction of assault occasioning actual bodily harm; or *R v Kowalski* (1988) 86 Cr App R 339 (CA) in which the victim was subjected to a protracted ordeal involving forced oral and vaginal intercourse while her husband held her at knife point telling her 'You can do better than that. If you help me you will live, if you don't you will die'.

28. David S Riggs, Dean G Kilpatrick and Heidi S Resnick, 'Long-Term Psychological Distress Associated with Marital Rape and Aggravated Assault: A Comparison to Other Crime Victims' (1992) 7 *J Fam Violence* 283.

29. Home Office, 'Setting the Boundaries: Reforming the Law on Sex Offences' (Home Office Communication Directorate, London July 2000) [2.8.7–2.8.8].

30. Evan Stark, 'Forward' in Louise McOrmond-Plummer, Jennifer Y Levy-Peck and Patricia Eastale (eds), *Perpetrators of Intimate Partner Sexual Violence* (Routledge, Abingdon 2016) xxiii.

31. Ibid.

32. Stark, *Coercive Control* (n 1) 108, 128.

connotations of seriousness. In using these terms, I thus deliberately resist placing these two types of sexual violation in a hierarchy.

Both chronic and acute sexual violation, as conceptualised here, can take place in relationships and both forms can take place outside intimate relationships. Thus, unlike Stark, I do not propose to create a distinction between rape in relationships and stranger rape.³³ Instead, the classification I propose is based on the temporal duration of the violation, i.e. is the victim's will overborne in the course of one specific incident, or is their autonomy gradually eroded via a longer term process? Nevertheless, I acknowledge that chronic sexual violation is likely to be strongly correlated with coercive controlling relationships and that it always requires some kind of ongoing relationship as a context (such as a friend, family member, classmate, co-worker, manager or other acquaintance) but not necessarily an intimate partnership. In the following section I therefore use coercive controlling relationships as a case study through which to develop and articulate the concept of chronic sexual violation.

Coercive Control and Chronic Sexual Violation

'Coercive control' refers to a particularly pervasive and harmful form of abuse within intimate relationships, increasing understanding of which has had a significant impact on law and policy reform in the UK over the last decade. These developments owe much to Stark's pathbreaking work *Coercive Control*, in which Stark explains that coercive control consists of a web of techniques through which men entrap and dominate their female partners.³⁴ Crucially, abusers control their victims through the interplay of a range techniques including intimidation, isolation, violence, surveillance and emotional coercion. For example, violence in these relationships is often 'low-level' (i.e. does not cause serious injuries), but it demonstrates the abuser's physical strength and warns the victim to take his threats seriously. Constant monitoring of the victim's activity by the abuser communicates that he will know if she disobeys him. Physical and social isolation leave victims without the material resources or opportunity for escape, and without access to alternative perspectives that could challenge the view of the relationship that her abuser is imposing on her. Emotional cruelty exacerbates feelings of worthlessness and hopelessness, while abusers' meticulously specific demands keep victims busy and exhausted, further reducing their capacity to plan and carry out an escape. Coercive control is thus an ongoing and multi-layered process through which the victim's autonomy is gradually chipped away. Fundamentally, it consists of the micromanagement of the victim's day to day life. In these conditions, victims have little or no control over whether or on what terms they have sex.

'It Was Always on His Terms': Sexual Violation in the Context of Coercive Control

Understanding that coercive control perpetrators constrain their victims' sexual activity through a complex network of strategies does not, by itself, necessitate a conceptual distinction between chronic and acute forms of sexual violation. Arguably, one could still evaluate each individual sexual encounter within that relationship as a discrete event to determine whether or not it was an act of sexual violation. To make such a determination accurately might require a more contextualised notion of consent than that currently employed within sexual offences law,³⁵ informed by an understanding of coercive control as

33. Stark, 'Forward' (n 30).

34. Stark, *Coercive Control* (n 1). I take the position that both coercive control and chronic sexual violation can be perpetrated by people of all genders against people of all genders. However, for clarity and in recognition of the fact that the survivor accounts which inform this analysis are from female survivors of abuse by men, I refer to abusers and victims using male and female pronouns respectively.

35. See, eg, Hunter and Cowan (eds) (n 13); Vanessa E Munro, 'An Unholy Trinity? Non-Consent, Coercion and Exploitation in Contemporary Legal Responses to Sexual Violence in England and Wales' (2010) 63 CLP 45; Palmer, 'Distinguishing Sex from Sexual Violation' (n 14).

set out above, but would not necessarily require a departure from the paradigm of rape and sexual assault as individual acute events. However, Stark's account of coercive control illustrates how conceptualising domestic abuse within an assault paradigm abstracts individual acts of violence from their context and overlooks the majority of abusers' coercive and controlling tactics and the ways they interact with each other. In a similar way, if we use (sexual) assault as the measure of intimate partner sexual violence and concern ourselves only with identifying individual incidents of non-consensual sexual activity, then significant aspects of the sexual abuse experienced by victims are marginalised and substantial elements of the perpetrator's wrongdoing are rendered invisible. We fail to see the wood for the trees.

In this section I develop a conceptual framework of 'chronic sexual violation' in order to make this 'wood' visible. This framework draws primarily on accounts of intimate partner sexual violation as detailed in the limited published literature on this specific topic, as well as the broader literature on domestic and sexual abuse. I analyse key strands of sexually abusive behaviour identified in the literature, in order to illuminate those aspects which are marginalised by the sexual assault paradigm, and to articulate their location within larger ongoing patterns of sexual violation.³⁶ Analysis of the literature is supplemented by accounts from survivors interviewed during my doctoral research into understandings of sex and sexual violation.³⁷ Data from this project were selected for inclusion where they provide further elucidation of key themes. The construct of chronic sexual violation is thus grounded in the lived experience of survivors and informed by the theory of coercive control.

As with non-sexual violation in coercive controlling relationships, sexual abuse in this context often includes frequent, 'low level' sexual assaults such as grabbing, groping, 'mauling' or touching the victim against her will. As McOrmond-Plummer recalls:

Richard forced touching and kissing on me, or, to illustrate a point, he would grab my hand and force me to touch his penis. It was a fairly constant culture.³⁸

Such incidents are, technically, criminal sexual assaults: The perpetrator touches the victim without her consent and without a reasonable belief that she consents.³⁹ Yet such assaults are unlikely to ever trouble the criminal justice system. Although victims resent this unwanted touching, they are unlikely to think of these instances as individual assaults, but rather as one strand of their partner's abusive behaviour. Moreover, it is hard to imagine a prosecutor or magistrate accepting that having one's breasts or buttocks groped by a partner amounts to an assault rather than merely an annoying habit. The continuation of the relationship is likely to be read as evidence either that the victim consented, or the defendant reasonably believed there was consent. This is exacerbated by a legal framework that assumes the most serious sexual assaults involve penetration.⁴⁰ These assaults are thus *de facto* decriminalised, but for perpetrators and victims they function as an assertion of ownership—a frequent reminder that her body is not her own, but his to do with as he pleases.

36. Sally Challen, whose murder conviction for killing her abusive husband was reduced to manslaughter in 2019 said of their sex life: 'he dictated when sexual activity would take place and it was always on his terms'. Caroline Davies, 'New Coercive Control Laws under Spotlight in Hammer Killing Appeal' *The Guardian* (27 February 2019) <<https://www.theguardian.com/uk-news/2019/feb/27/new-coercive-control-laws-under-spotlight-in-hammer-killing-appeal>> accessed 3 July 2019.

37. The doctoral research included telephone interviews with 19 lay people about their understandings of sex and sexual violation. Six respondents from this sample disclosed experiences of sexual and/or domestic violence, though they were not specifically recruited as survivors. The PhD was funded by ESRC grant number ES/F035705/1. For full details see, Tanya Palmer, 'Contested Concepts: Sex and Sexual Violation in the Criminal Law' (PhD Thesis, University of Bristol 2012).

38. Louise McOrmond-Plummer, 'Lucky to Be Alive: A Battering Partner Rapist' in Louise McOrmond-Plummer, Jennifer Y Levy-Peck and Patricia Eastale (eds), *Perpetrators of Intimate Partner Sexual Violence* (Routledge, Abingdon 2016) 102.

39. SOA 2003, s 3.

40. SOA 2003; for the purposes of sentencing the touching of naked breasts or genitals is also treated as more serious than touching through clothing: Sentencing Guidelines Council, 'Sexual Offences: Definitive Guideline' <<https://www.sentencingcouncil.org.uk/publications/item/sexual-offences-definitive-guideline/>> accessed 5 May 2020.

A second strand of sexually abusive behaviours involves denying the victim her privacy:

He would come into the bathroom and just open the shower screen door and just stand there and stare at me while I was showering and I would say, 'Do you mind, I'm having a shower?' He'd say, 'Your body's my body and I want to look at my body, so I'm quite entitled'. I'd try to shut the door and he wouldn't leave. I found that very invasive'.⁴¹

Being watched and/or timed while bathing, showering or using the toilet is a common theme in victim accounts of coercive control.⁴² Like other forms of surveillance and micromanagement used by abusers, this tactic serves to control the victim's behaviour and reinforce a sense that she is always being watched, that her abuser will know if she disobeys him. Furthermore, such denials of privacy constitute a particularly intimate form of intrusion that operates to shame and alienate victims from their own bodies, rendering them permanently exposed and on display for someone else. Perpetrators also violate victims' privacy by surreptitiously videotaping them, and by sharing, or threatening to share, intimate photographs.⁴³

Some of these behaviours could be understood as specific criminal offences. Disclosing private sexual photographs and observing or recording a person doing a private act without consent are both prohibited.⁴⁴ Yet these offences have a number of limitations,⁴⁵ particularly in the context of ongoing relationships. For example, the relevant voyeurism offence requires a purpose of sexual gratification—a desire to humiliate or control is not sufficient. It is not my purpose here, however, to advocate for reforms to these offences. Rather that (where relevant) denials of privacy need to be understood as part of a larger process of restricting the victim's sexual autonomy.

A third theme in accounts of intimate partner sexual violence is the use of pornography. Specifically, abusers use pornography to further constrain the victim's agency by pressuring her to watch pornography against her will and/or to mimic the acts depicted.⁴⁶ Within a sexual assault paradigm such behaviour is peripheral—relevant only where it accompanies an identifiable incident of non-consensual sexual contact, and then only as an additional detail exacerbating the crime, rather than as a central wrong in and of itself. While it is widely understood that pornography is used to 'groom' children,⁴⁷ it is generally assumed an adult could simply refuse to watch and that in any case being exposed to pornography is at worst unpleasant rather than harmful.

Unwanted exposure to pornography can, in fact, be harmful. Cornell explains this harm as a violation of the 'imaginary domain'—an individual's ability to project an image of themselves as whole and as worthy of personhood.⁴⁸ For Cornell, the problem with enforced viewing of pornography stems from the combination of the content of much mainstream heterosexual pornography—which presents a woman's self as 'reducible to an object',⁴⁹ her "sex" as shameful, as something to be despised,⁵⁰ and her body as 'not only violable but there to be violated'⁵¹—and its pervasiveness, which makes this particular

41. Sarah, quoted in Easteal and McOrmond-Plummer (n 22) 58.

42. Stark, *Coercive Control* (n 1) 261.

43. Walter S DeKeseredy and Amanda Hall-Sanchez, 'Adult Pornography and Violence against Women in the Heartland: Results from a Rural Southeast Ohio Study' (2017) 23 *Violence Against Women* 830, 840.

44. Criminal Justice and Courts Act 2015, s 33 and Sexual Offences Act 2003, s 67, respectively.

45. Clare McGlynn, Erika Rackley and Ruth Houghton, 'Beyond "Revenge Porn": The Continuum of Image-Based Sexual Abuse' (2017) 25 *Fem. L.S.* 25.

46. DeKeseredy and Hall-Sanchez (n 43); Catherine Moreau and others, 'Capturing Sexual Violence Experiences among Battered Women Using the Revised Sexual Experiences Survey and the Revised Conflict Tactics Scales' (2015) 44 *Arch. Sex. Behav.* 223; Raquel Bergen and Kathleen Bogle, 'Exploring the Connection Between Pornography and Sexual Violence' (2000) 15 *Violence Vict.* 227; Russell (n 23).

47. Alisdair A Gillespie, 'Indecent Images, Grooming and the Law' [2006] *Crim LR* 412.

48. Drucilla Cornell, *The Imaginary Domain: Abortion, Pornography and Sexual Harassment* (Routledge, Abingdon 1995) ch 3.

49. *Ibid* 103.

50. *Ibid* 147.

51. *Ibid* 148.

portrayal of heterosexuality ‘appear as the truth of “sex”’.⁵² Cornell is focused on the proliferation of pornographic images in public space, thus her suggested solution of zoning legislation has little relevance here. Nevertheless, her articulation of the harm of enforced exposure to pornography is apt to capture the way in which an abuser’s use of pornography is one more way in which he imposes his view of the ‘truth’ of what sex is and should be, and forecloses the victim’s ability to imagine, let alone live out, an alternative vision of herself and her sexuality. As with violations of privacy my purpose here is not to suggest that non-consensually exposing an adult to pornography should be formulated as a specific legal wrong, rather that *in combination* with various other behaviours it can undermine a person’s freedom and capacity to control their own sex life. In any event, the types of pressure employed by abusers to control victims’ sexual activity—whether that involves making a victim watch pornography or engage in a particular sexual act—often lack sufficient directness or severity to register as ‘non-consensual’.

‘He demanded sex’, ‘he insisted on making love to me’⁵³: such language is common in survivors’ accounts of intimate partner sexual violence. McOrmond-Plummer, Eastaale and Levy-Peck explain that in order to ‘negate consent’, abusers use ‘a range of coercive tactics such as withdrawing affection or withholding housekeeping money, not allowing their partner to sleep, or repeatedly badgering her to engage in acts she has stated she does not like’. They then assert that ‘Sexual activity enacted with this sort of duress is rape/sexual assault’.⁵⁴ Under the current law of England and Wales, this is not so clear cut.

Under the SOA, s 74, consent is defined as an agreement by choice with freedom and capacity to make a choice. Application of this provision continues to invoke the distinction between ‘real consent’ and ‘mere submission’ set out in *Olugboja*, in which it was stated that consent ‘covers a wide range of states of mind . . . ranging from actual desire on the one hand to reluctant acquiescence on the other’.⁵⁵ Courts are thus faced with the difficult task of determining whether the pressure or coercion rises to a level whereby the sex is not consensual, in which case an offence can be established, or whether the complainant had sufficient freedom to make a choice and did in fact agree, in which case the parties engaged in consensual sex.⁵⁶ If a complainant has given in to pressure that an adult could reasonably be expected to resist, this is likely to fall on the reluctant consent side of the line, rather than the submission side of the line.⁵⁷ Thus, a threat to withhold housekeeping money or similar forms of financial coercion might negate consent, as McOrmond-Plummer et al suggest, but only if there is a sufficiently clear link between the withholding of money and a particular sexual encounter. Similarly, intensively badgering someone to engage in a particular sex act on a particular occasion, such that it literally prevents them from doing anything else, in circumstances where they cannot feasibly go somewhere else, might vitiate consent to sex.⁵⁸ But a more drawn out process of wearing someone down by repeatedly asking them to

52. Ibid 148.

53. Sandra Horley, *Power and Control: Why Charming Men Can Make Dangerous Lovers* (Vermilion, London 2002) 78.

54. Louise McOrmond-Plummer, Patricia Eastaale and Jennifer Y Levy-Peck, ‘Introduction’ in Louise McOrmond McOrmond-Plummer, Jennifer Y Levy-Peck and Patricia Eastaale (eds), *Perpetrators of Intimate Partner Sexual Violence* (Routledge, Abingdon 2016) 3–4, reference omitted.

55. *R v Olugboja (Stephen)* (1981) 3 WLR 585 (CA) 331.

56. Jennifer Temkin and Andrew Ashworth, ‘The Sexual Offences Act 2003: (1) Rape, Sexual Assaults and the Problems of Consent’ 2004 Crim LR 328.

57. *Watson v R* [2015] EWCA Crim 559. Here the court rejected the *Olugboja* distinction between ‘reluctant acquiescence’ (consent) and ‘mere submission’ (non-consent) in favour of a distinction between ‘reluctant consent’ where V may feel unable to resist but nevertheless retains the freedom and capacity to make a choice and non-consent where V lacks the freedom and capacity to choose.

58. But see AP Simester and others, *Simester and Sullivan’s Criminal Law* (6th edn, Hart Publishing, Oxford 2016), who argue at p 483, following *Watson* (n 57) that where ‘D pesters V for sex, until V eventually agrees . . . one might argue that it is a form of “submission,” but the Court of Appeal would then say that it is not the type of submission that denies consent’.

do something they have previously refused, or of withdrawing affection as a punishment for non-compliance, is highly unlikely, by itself, to be read as vitiating consent.

I submit that, *within the parameters of a consent framework*, this interpretation is correct. In a non-abusive relationship, if one party becomes cold and distant when refused sex on a particular occasion, or requests—even insists—the other do something they have previously said no to, the other party should still be capable of saying no. These types of tactics are annoying, upsetting, manipulative and cruel—certainly they are not respectful or ethical ways to interact with one's sexual partners. But, abstracted from a fuller context of control and abuse, they are insufficient to vitiate consent. They do not constitute circumstances so severe that one is compelled to give in to the other's demands. If a partner or date resorts to pig-headedness or emotional cruelty to attempt to get their way sexually, one is usually able to end the conversation, date or relationship. However, this way of thinking—i.e. the consent framework itself—ignores the specific position of the coercive control victim.

Seemingly low-level threats can take on much greater salience when located within a web of controlling behaviours. Punishments such as withholding affection or threatening to end the relationship do constitute grave consequences when you have been isolated from other sources of emotional support. Sulking becomes terrifying when you have previously experienced a partner's quietly seething mood erupt into a violent rage. Persistent badgering is much harder to resist when you have been kept so busy and exhausted that you simply do not have the energy to stand your ground. Leaving is not an option when you have tried multiple times to end the relationship only to find this exacerbates your partner's aggression and there are no support systems in place to help you. It is only when the types of pressure outlined here are read against the backdrop of coercive control that victims' acquiescence to some forms of coercion becomes legible as sexual violation.

Thus far I have focused, broadly speaking, on unwanted sexual activity including being touched, observed, or exposed to pornography. A rather different strand of chronic sexual violation occurs where sex is consented to, even actively desired, but the manner of the sex is not. A victim of abuse may genuinely want sexual intimacy from their partner, however, the sexual activity then does not proceed in accordance with the victim's wishes. For example, the sex may be more physically rough than she wished, accompanied by name-calling, using positions she finds demeaning or painful, or it may be the frequency or timing of sex to which the victim objects. A consent framework cannot account for the insidious ways in which longed-for intimacy is transformed into an experience of being used and humiliated or the deep sense of betrayal this engenders. There is limited scope here for recognising that a complainant has consented to sex, *but not like that*, as I explore further in the analysis of *F v DPP*, below. Crucially, again, it is the routine nature of this behaviour and its interaction with other forms of coercion and control that distinguishes chronic sexual violation from the actions of a selfish and insensitive lover whom the victim can choose not to see again.

Ostensibly consensual sex where the victim is allowed no input into the quality of the sexual encounter often intersects with two other key themes: sexual humiliation and reproductive coercion. The latter can include refusing or sabotaging contraceptives, coercing a victim to become or stay pregnant, pressuring her to have an abortion or using violence to bring about a miscarriage.⁵⁹ Sexual humiliation may be verbal, deploying sexualised insults such as 'slut' and 'whore', comparing the victim to other women, or taunting her about her supposed undesirability, such as the survivor who told Sandra Horley 'My husband would tell me that making love to me was like going to the toilet. He only did it to relieve himself'.⁶⁰ And it may involve coercing the victim to engage in activities she finds distasteful,

59. Jennifer Y Levy-Peck, 'Perpetrators and Reproductive Coercion' in Louise McOrmond-Plummer, Jennifer Y Levy-Peck and Patricia Easteal (eds), *Perpetrators of Intimate Partner Sexual Violence* (Routledge, Abingdon 2016); Emma Williamson, 'Reproductive Coercion' in Louise McOrmond-Plummer, Jennifer Y Levy-Peck and Patricia Easteal (eds), *Intimate Partner Sexual Violence: A Multidisciplinary Guide to Improving Services and Support for Survivors of Rape and Abuse* (Jessica Kingsley Publishers, London 2013).

60. Horley (n 53).

and/or which are socially stigmatised. Common examples include anal sex and sex with or in front of other people.⁶¹ Georgia's partner would only pay back money he owed her in return for sex:

You end up [thinking], 'Oh my God, I must be some sort of prostitute', so you can't speak out about that because that's bad. . . . 'Cause when I spoke out and said . . . for him to pay me back money . . . they just looked at me in disgust and thought, 'My God, you crazy woman! How the hell can you come out with that?''⁶²

Together these behaviours express the perpetrator's dominance over and contempt for his victim. They also serve to further isolate and control her. For example, forcing a pregnancy to further entrap the victim in the relationship, or using belittling language and humiliating activities to make her ashamed to tell anyone what is happening and seek support, as in Georgia's case. It is important to note that some of these behaviours do amount to the crime of rape: consent to vaginal intercourse is not consent to anal penetration, consent to sex with a condom is not consent to sex without,⁶³ consent on one occasion is not consent for all time,⁶⁴ and initial consent can be revoked during an encounter. Yet isolating those incidents that cross this legal threshold can obscure the gravity and strategic nature of chronic sexual violation.

Presenting further challenges for the consent framework are scenarios where a victim initiates the sexual behaviour. When I interviewed Rosa, she recounted an incident in which she had 'jumped [her partner's] bones' when he came home 'in a foul mood' because she was afraid of getting hit.⁶⁵ Rosa's partner did not explicitly threaten her with violence on this occasion, but on the basis of her past experience with him, she judged that she needed to find a way to diffuse the tension in order to avoid him lashing out at her. Leahy has noted similar examples of women initiating sex with abusive partners whenever they were drunk, calculating this is the best way to avoid violence, or offering sex on payday knowing it was the only way their abuser would hand over housekeeping money.⁶⁶ This is not legible as sexual violation if we restrict our focus to the use of force or threats in the immediate moment to gain compliance. Moreover, even if we understand that threats can be implicit and implicate past behaviour, it is difficult to reconcile the image of a fearful victim coerced into submission, with the reality of a woman pro-actively initiating sex to assert some (limited) control over her situation—what Stark refers to as 'control in the context of no control'.⁶⁷ Framing these instances as part of a pattern of chronic sexual violation as opposed to acute incidents allows us to understand Rosa's sex life as dictated by her partner's mood, and to begin to appreciate the feeling of walking on eggshells produced by a constant state of hyper-vigilance and second guessing how best to placate him.

Throughout this section I have focused on behaviours that would not amount to rape—either due to a lack of sexual penetration or because the constraints placed on the victims' choice do not appear severe enough to vitiate consent—in order to emphasise that chronic sexual violation in abusive relationships involves much more than just non-consensual intercourse. However, I want to be absolutely clear that these relationships *do* almost always involve rape in the strict legal sense, often accompanied by brutal violence up to and including homicide. Indeed as sexual violation escalates in the later stages of coercive controlling relationships it often reaches the point of 'rape as routine'.⁶⁸ This phenomenon is viscerally

61. David Adams, 'Talking to Killers: What Can They Tell Us about Sexual Assault as a Risk Factor for Homicide?' in Louise McOrmond-Plummer, Jennifer Y Levy-Peck and Patricia Eastaie (eds), *Perpetrators of Intimate Partner Sexual Violence* (Routledge, Abingdon 2016).

62. Interview with 'Georgia', for Palmer, 'Contested Concepts' (n 37).

63. *Assange v Sweden* [2011] EWHC 2849 (Admin).

64. *R v C* [2009] UKHL 42, [2009] 1 WLR 1786 [27] (Baroness Hale).

65. Interview with 'Rosa', for Palmer 'Contested Concepts' (n 37); For further discussion of this incident, see Palmer, 'Distinguishing Sex from Sexual Violation' (n 14).

66. Susan Leahy, 'Rape within Relationships: Addressing the Challenges of Proving an Absence of Consent' (Perspectives on Consent in Sexual Offences Workshop, Queen's University Belfast, February 2020).

67. Stark, *Coercive Control* (n 1) 216.

68. Stark, 'Forward' (n 30) xxiv.

evoked by Mason's description of the 'normal pattern' during a four-and-a-half month period towards the end of her abusive relationship:

I remember the feeling when he turned toward me in bed and put his hand on my side. I would be filled with a surge of fear, panic. It was like a death-toll. I would plead with him, beg him, try to move away or get up, try moving his hand, try to reason with him. It never made any difference. . . . And then [his hand] would start to move up, slowly, decidedly, while the other hand continued to hold me. I would be rigid, my arms crossed tightly across my breasts, trying to stop that hand. But he is so much stronger than I am. He would easily push my arms out of the way and maul my breasts, squeezing, pulling, pinching, rubbing, all so hard that it would hurt. He would pull my pants down. Off for rape; to the knees for buggery. No amount of trying to wriggle or squirm would help. I would just be held tighter and forced down on his penis. That would hurt. From that point on there is nothing in most cases. Most assaults have rolled into one, always following the same pattern.⁶⁹

This lived experience of rape as an everyday occurrence, as an invasion of home and intimacy, as repetition that 'rolls into one', is different from the experience of rape as an acute, jarring event in ways that matter to survivors and make the label 'rape' inadequate to fully articulate the specificity of sustained, as opposed to singular, trauma.

The relationship between chronic and acute sexual violation is therefore complex. When a person is raped by their partner this might function simultaneously as an acute incident of sexual violation and as support for an enduring, chronic violation of the victim's sexual autonomy. The victim experiences an intense overwhelming violation of their sexual autonomy as their partner rapes them, but after the rape, or between rapes, they experience a generalised absence of choice or control over the sexual element of their relationship. In relation to the coercive control framework Stark identifies 'partner sexual assault and coercion' as a 'defining element of coercive control', and specifically positions this behaviour as a form of coercion.⁷⁰ Acute incidents of sexual violation are coercive because they use relatively direct and transparent threats or force to compel a particular response in the moment.⁷¹ However, I argue that chronic sexual violation also functions as a form of control. According to Stark,

Control is comprised of structural forms of deprivation, exploitation, and command that compel obedience indirectly by . . . dictating preferred choices, microregulating a partner's behaviour, limiting her options, and depriving her of supports needed to exercise independent judgment.⁷²

The routinised nature of much chronic sexual violation—the nightly rapes, constant groping, denial of privacy, and dictation by one person of whether, when and how sex should take place—operates to compel the victim's obedience in general by instilling the sense that she has no real control over her sexual choices and that it is futile to attempt to assert her own sexual desires. The deliberate use of sexualised humiliation shames victims into silence, cutting off sources of support and outside perspective as profoundly as physical isolation.⁷³ In addition, the erosion of the victim's sexual autonomy through chronic sexual violation can be understood as a manifestation of the 'condition of unfreedom'⁷⁴ that results from the abuser's deployment of coercive and controlling tactics.

69. Lindsey Mason, "'But He Didn't Hit Me!'" Living with a Non-Physical-Battering Sexual Abuser' in Louise McOrmond-Plummer, Jennifer Y Levy-Peck and Patricia Eastale (eds), *Perpetrators of Intimate Partner Sexual Violence* (Routledge, Abingdon 2016) 93.

70. Evan Stark, 'Coercive Control as a Framework for Responding to Male Partner Abuse in the UK: Opportunities and Challenges' in Nancy Lombard (ed), *The Routledge Handbook of Gender and Violence* (Taylor & Francis Group, Milton Park 2017) 21.

71. Stark, *Coercive Control* (n 1) 228–29.

72. Ibid 229.

73. Haley Clark and Antonia Quadara, *Insights into Sexual Assault Perpetration: Giving Voice to Victim/Survivors' Knowledge* (Research Report No 18, Australian Institute of Family Studies 2010).

74. Stark, *Coercive Control* (n 1) 205.

The assemblage of behaviours which I refer to as chronic sexual violation includes frequent sexual assaults, denials of privacy, compelling the victim to watch and/or imitate pornography, diffuse and cumulative forms of pressure, sex that is ostensibly consensual but the manner of sex is not, sexual humiliation, reproductive coercion, and victims initiating sex in order to protect themselves, not all of which need be present to qualify. Despite its entanglements and overlaps with the concepts of rape and coercive control, there is a value to articulating chronic sexual violation as a distinct construct. This is designed to give expression to the specific lived experience of chronic sexual violation, as distinct from acute sexual violation, without trivialising either. Chronic sexual violation recognises the cumulative effect of a constellation of behaviours designed to control and denigrate the victim's sexuality. In grounding this conceptualisation in an analysis of survivor accounts my primary goal is to facilitate the articulation of survivor experiences which the language of 'rape' does not sufficiently capture. In turn, this construct can be used to critique sexual offences law.

'A Pattern of Roughness Had Developed between Them': The Case of *F v DPP*

The case of *F v Director of Public Prosecutions (DPP)*⁷⁵ illustrates the ways that chronic and acute sexual violation function within coercive controlling relationships as well as the difficulties of addressing chronic sexual violation within the existing sexual offences framework. In May 2010, F reported her husband ('D') to the police for various acts of sexual violence committed against her.⁷⁶ Excerpts of F's statements included in the judgment paint a picture not of isolated incidents of non-consensual sex, but of a continuous and developing pattern in which all sexual encounters between F and D came to be dominated by his sexual desires, while hers were erased or overridden. According to F,

almost all sex with [D] involved him displaying dominance, control and emotional detachment or aggression... occasionally sex would begin intimately but then [D's] demeanour would suddenly change and he would become detached and domineering, often pinning me by my throat... as the relationship progressed I felt less and less like I had the right to say no to his sexual demands. He impressed on me verbally that as his Muslim wife I should fulfil his sexual needs unquestionably. I felt it was not acceptable to him for me to refuse to be intimate for any reason and as time went on, due to reactions I encountered in him, I became increasingly fearful about saying no to him because of the potential consequences of doing so.⁷⁷

In this passage, F describes her partner imposing his preference for physically aggressive and emotionally detached sexual activity upon her. The judgment contains several further references to what D himself described as his 'oppressive sexuality',⁷⁸ such as calling her 'his "bitch"' during intercourse,⁷⁹ and dragging her out of bed when she was sick and then 'expect[ing] me to get completely undressed, put on heels and allow you to handcuff me in the freezing cold'.⁸⁰ It appears to have been clear to D that F did not enjoy this type of sexual activity. On one occasion they argued about her unwillingness to participate, with D framing the issue as F failing to satisfy him and 'forcing him to suppress many aspects of his sexuality'.⁸¹ In later email exchanges F mentions crying, begging and pleading him not to do these things,⁸² while D acknowledges, 'I degraded you, humiliated you from the first day and you

75. *F v Director of Public Prosecutions* [2013] EWHC 945 (Admin) [2014] QB 581 ('*F v DPP*').

76. This was not the first time F had reported him. In May 2009, she made a statement to the police regarding D's sexually aggressive behaviour towards her. At this time she did not want him to be charged, but she did want his violence on record.

77. *F v DPP* (n 75) [8].

78. *Ibid* [18].

79. *Ibid* [8].

80. *Ibid* [16].

81. *Ibid* [12].

82. *Ibid* [16].

played along because you felt you had to. I know you now and not once did you enjoy it'.⁸³ What makes this behaviour abusive then, is not the disparity between the parties' desires or the specific nature of D's desires, but his insistence on enacting these desires upon F.

This pattern of sexual behaviour is best understood as chronic sexual violation rather than as several distinct incidents of acute violation in part because F's own account suggests she experienced this as a gradual erosion of her sexual autonomy, rather than as a dynamic in which her autonomy was respected on some occasions and violated on others. Her use of the phrases 'as the relationship progressed' and 'as time went on' in the above extract indicate an incremental shift in the balance of power within the relationship which needs to be looked at holistically.

This conceptualisation gives expression to some of the subtler examples of D imposing his sexuality on F that would be less visible through the lens of acute sexual violation. For example, being emotionally distant, calling someone names or grabbing them by the hair during otherwise consensual intercourse does not, by itself, transform that intercourse into rape. In the extract above, F states, 'occasionally sex would begin intimately' but then the tone of the encounter would suddenly change.⁸⁴ From the limited evidence available it is possible some of these encounters began consensually and then F withdrew her consent, but it also appears that at times she reluctantly consented to sex on D's terms, and that during the time they were together she actively wanted to have a sexual relationship with him, but objected to his demeanour during sex.

To the extent that F did comply with D's sexual demands, this compliance was motivated by an atmosphere of intimidation and fear. In the passage quoted above she refers to her fear of 'the potential consequences' of saying no.⁸⁵ F's fears included the fear that D would leave her,⁸⁶ as well as fears of physical violence and rape.⁸⁷ Threats of physical and sexual violence are clearly severe enough to vitiate consent but, as I explore further below, are often disregarded if they do not occur during or immediately before a specific instance of sexual contact. As for threats to end the relationship, the potency of such threats and their ability to overwhelm an adult's freedom to choose only makes sense when, as discussed in the previous section, they are contextualised within a broader dynamic of control and unequal power.

There is plentiful evidence of such a dynamic in *F v DPP*, as acknowledged by all the key parties to the case. F described feeling 'completely powerless and enslaved'.⁸⁸ Lord Judge CJ characterised the marriage as 'marred by [D's] abusive dominance',⁸⁹ while the legal adviser to the DPP accepted that 'much of what [F] describes fits squarely within the Government definition of domestic violence'.⁹⁰ Even D admitted to 'degrading' and 'humiliating' F.⁹¹ Two patterns that particularly stand out from the case facts are D's disorienting manner of switching suddenly from intimacy to aggression; and the tendency for D's aggression towards F to be followed by a show of remorse on his part, *her* attempting to comfort and placate *him*, and then him initiating sex to reassert control and re-establish the status quo. D also subjected F to reproductive coercion. In one particular incident, which became the central focus of the judgment, D deliberately ejaculated inside F against her express wishes and in the knowledge that she did not want to become pregnant. She did become pregnant as a result. These tactics—disorienting the victim, the cycle of aggression, remorse and reconciliation, and reproductive coercion—are all common features of domestic abuse. F's experience thus exemplifies many of the hallmarks of chronic sexual violation outlined above. Significantly however, F's experience of attempting to hold D

83. Ibid [18].

84. Ibid [8].

85. Ibid [8].

86. Ibid [8].

87. Ibid [9].

88. Ibid [17].

89. Ibid [8].

90. Ibid [8].

91. Ibid [18].

responsible for his actions via the criminal justice system exposes the inadequacy of the current legal framework for addressing chronic forms of sexual violation.

F reported D's behaviour to the police in May 2010. Following an investigation, the DPP refused to initiate a prosecution. In June 2011, F filed a claim for judicial review of the DPP's decision, at which point the DPP offered to review the case. Alison Levitt QC, then principal legal adviser to the DPP, reviewed the original decision and concluded that although F's credibility was secure, there was insufficient evidence to establish a realistic prospect of conviction. In other words, Levitt did not doubt F's story, but she was not convinced the facts alleged amounted to rape. F then applied for a judicial review of this second decision not to prosecute D, arguing that it was based on an erroneous interpretation of the law of rape. Lord Judge CJ handed down the judgment of the court, which granted F's application for judicial review, and it is from this judgment that the facts discussed above are drawn. It is not possible to trace whether the review ever resulted in a prosecution or conviction for D. Nevertheless, this case illustrates the ways in which prosecutors and judges struggle to satisfactorily recognise and respond to chronic sexual violation within the framework of sexual offences designed to address acute incidents of non-consensual sex.

The High Court agreed with F that Levitt's renewed decision not to prosecute was founded on an incorrect understanding of rape law. Specifically, Levitt was held to have erred in her analysis of an incident on 22nd February 2010: Following a now familiar pattern, D and F argued, D apologised, and F put her arms around him. Then,

Miss Levitt describes how [D]: "turned [F] around over the basin and pulled her pyjamas down, penetrating her vagina with his penis." Although this form of sexual intercourse was disappointing to the claimant, she did not object, provided he withdrew before ejaculation. . . . However shortly after penetration, and without allowing her any chance to object, [D] told [F] that he would be coming inside her "because you are my wife and I'll do it if I want." ⁹²

Levitt concluded this would amount to rape if D had intended to ejaculate inside F from the outset, but not if this was 'a spontaneous decision made at the point of ejaculation', ⁹³ and that there was insufficient evidence to prove which was the case. The court, correctly, held this was irrelevant: F's consent to intercourse was vitiated at the point at which D deliberately ejaculated inside F with the knowledge that her consent to sex was conditional on him not doing so, and from that point onwards D's penetration of F amounted to rape. ⁹⁴ The court thus vindicated F's claims that D had raped her on this particular occasion, yet both Levitt and the court struggled to adequately recognise the extent and quality of F's lived experience of abuse.

Levitt in particular demonstrates a failure to understand the relationship between D's behaviour and F's lack of sexual autonomy. One incident referred to in the judgment, which took place on 2nd May 2009, involved D making 'aggressive sexual advances' towards F, which included pushing her to the floor, pulling her by her hair, and demanding oral sex (which she refused). During this incident, F feared that D would physically hurt and/or rape her. ⁹⁵ Levitt concluded a lack of consent to this sexual contact could be established, but that D may only have *realised* F was not consenting after the fact. Her doubts about D's *mens rea* appear to be based on D's expression of remorse the following day. F and D then went back to the gym where the events of May 2nd had taken place. She performed oral sex on him and they had intercourse, as he had wanted to the previous day. This is problematic for two reasons. First, in terms of applying the existing law, Levitt fails to consider whether it was *reasonable* for D to believe F was consenting on May 2nd, and this is not picked up on in the judgment. ⁹⁶

92. Ibid [14].

93. Ibid [20].

94. On this point the court followed *Assange v Sweden* (n 63).

95. *F v DPP* (n 75) [9].

96. Gavin A Doig and Natalie Wortley, 'Conditional Consent? An Emerging Concept in the Law of Rape: *R (on the Application of F) v DPP and A* [2013] EWHC 945 (Admin)' (2013) 77 JCL 286.

Second, Levitt appears to interpret the events of May 3rd through the abuser's lens, as an apology and reconciliation, rather than as a continuation of abuse. Notwithstanding that on May 3rd, D asked F 'whether she would ever refuse him again, and she said that she would not, and she was later to tell the police that she complied with his demands in order to please him'.⁹⁷ Nevertheless, neither Levitt nor the court appear to consider the sexual activity on May 3rd as anything other than consensual. This failure to join the dots between D's aggression and F's fear of physical and sexual violence on May 2nd, and her 'agreement' to have sex on May 3rd, is encouraged by the current legal framework which requires relevant sexual behaviour to be framed and considered as distinct incidents of potentially non-consensual sex, rather than chronic patterns of sexual violation.

A further incident in November 2009 involved an argument, following which D 'became "aggressive," and "pulled off her pyjama bottoms, tore her underwear and took her by the throat"', stopping only when he heard F's son wake.⁹⁸ Levitt decided it was right not to prosecute this incident because 'a jury would be justified in concluding that a "pattern of sexual force or roughness had developed between them, to which there was at least a degree of acceptance on her part, and which he understood that she agreed to, even if reluctantly"'.⁹⁹ Here, troublingly, D's *repeated* use of violence appears to put him in a more favourable legal position than if he had only used force once. Meanwhile F's 'acceptance' of his behaviour is read as consent, with neither Levitt nor the court considering whether this would be better described as submission through fear, and therefore not consent.¹⁰⁰ The broader point, however, is that even if D had been successfully prosecuted for rape in relation to this specific incident, this would provide only a limited and partial recognition of the wrong done to F, which obscures some of the key features of that wrong. We would still be failing to see the wood for the trees.

The *F v DPP* judgment provides a vivid illustration of this metaphor. F clearly provided a rich and detailed account of her relationship with D—this is the wood, a thick forest of domination and control. However, as there is no legal mechanism to address the pattern of behaviour as a whole, that account is necessarily cut down and cut up into three specific incidents—three individual 'trees'—which become the focus of the judgment. Ultimately the focus is narrowed further as only one of these incidents was held to constitute rape: that in which D ejaculated inside F against her wishes. Thus the *ratio* subsequently extracted from this case is that if B consents to sex with A on the condition that A does not ejaculate inside B, and A deliberately does ejaculate inside B, A has committed rape. The decision is generally discussed as part of a recent line of case law on 'conditional consent' and 'rape-by-deception'. Ironically, Lord Judge CJ was alert to issues of contextualisation and coercive control in his judgment. His conclusions are based on 'evidence from the history of the relationship, as well as what he said when sexual intercourse was taking place, and his observations to the claimant afterwards',¹⁰¹ and in ordering the judicial review he asserts, 'The entire body of evidence, both in relation to the nature and history of the relationship between these two people, and as it applies to each of the individual, specific occasions of complaint, requires re-examination'.¹⁰² Nevertheless the *ratio* of the case ultimately obscures the context of ongoing domination, violation and control.

Thus far, I have established that abusive relationships can feature both acute and chronic forms of sexual violation. I have articulated a construct of chronic sexual violation, setting out an assemblage of common features of this mode of violating a person's sexual autonomy. Via a case study of *F v DPP* I have established that the current legal framework is ill-equipped to respond because some aspects of chronic sexual violation are not legible at all through this lens, and for those that are, existing offences fail to give expression to the extent and quality of the wrong done to the victim. They fail to see the wood

97. *F v DPP* (n 75) [10].

98. *Ibid* [12].

99. *Ibid* [13].

100. *R v Olugboja (Stephen)* (n 55).

101. *F v DPP* (n 75) [25] emphasis added.

102. *Ibid* [27].

for the trees. In the final section I explore possibilities and challenges for recognising chronic sexual violation through the criminal law.

The Wood and the Trees: Chronic Sexual Violation and Criminal Responsibility

The key difficulty for recognising chronic sexual violation as a criminal wrong is that the standard contemporary model of criminal liability is incident focused: liability flows from a specific act of the defendant, their conduct at a particular moment in time (the *actus reus*). For serious offences this typically needs to coincide with a legally relevant state of mind such as an intention to do the act or an awareness that their act could cause a particular type of harm (the *mens rea*). This framework does not easily accommodate ongoing patterns of behaviour, especially where the actor may not be consciously thinking about the reasons for their behaviour or viewing them as part of a larger strategy, or where this thought process is difficult to prove.

Courts in England and Wales have developed several doctrines that stretch the temporal operation of either the *actus reus* or *mens rea*—including omissions liability, continuing acts,¹⁰³ and prior fault, in order to find a moment in time when the two elements of criminal liability coincide. While none of these doctrines is particularly useful in the context of chronic sexual violation, they do demonstrate that the challenge of attributing criminal responsibility to conduct which expands beyond a discrete moment in time is neither new nor unique to sexual violation. An alternative response has been the proliferation of hybrid orders such as the Anti-Social Behaviour Order and its successors,¹⁰⁴ Domestic Violence Protection Orders and Notices,¹⁰⁵ and Sexual Harm Prevention Orders.¹⁰⁶ These provisions are designed to prevent ongoing patterns of behaviour where the individual actions would not necessarily amount to criminal wrongs. Such orders have been criticised for ‘employ[ing] civil law processes in pursuit of criminal law objectives’ in a manner that ‘prioritis[es] expediency over principle’.¹⁰⁷ A full discussion of hybrid orders is beyond the scope of this paper; for present purposes they serve to illustrate both a growing frustration with the limitations of the criminal law, and the dangers of circumventing established criminal processes and their associated protections.

Turning to the criminal law itself, several offences have been introduced over the past two decades that explicitly or implicitly address chronic patterns of domestic abuse and sexual violation, the clearest example being the offence of controlling or coercive behaviour in an intimate or family relationship. Section 76 of the Serious Crime Act 2015 (SCA) prohibits ‘repeatedly or continuously engag[ing] in behaviour’¹⁰⁸ towards an intimate partner, or a former partner with whom the perpetrator is still co-habiting,¹⁰⁹ that causes ‘serious alarm or distress’ to the victim resulting in ‘a substantial adverse effect on [the victim]’s usual day-to-day activities’¹¹⁰ or ‘causes [the victim] to fear, on at least two occasions, that violence will be used against [them]’,¹¹¹ provided the defendant ‘knows or ought to know

103. See, eg, *Meli v R* (1954) 1 WLR 228 (Privy Council).

104. Crime and Disorder Act, 1998; Anti-Social Behaviour, Crime and Policing Act 2014, pt 1. For an overview, see Stavros Demetriou, ‘From the ASBO to the Injunction: A Qualitative Review of the Anti-Social Behaviour Legislation Post-2014’ [2019] PL 343.

105. Crime and Security Act 2010, ss 24–33. An expanded regime of Domestic Abuse Protection Orders and Notices is introduced in the Domestic Abuse HC Bill (2019–21) [96], pt 3.

106. SOA 2003 ss 103A–K.

107. Jennifer Hendry and Colin King, ‘Expediency, Legitimacy, and the Rule of Law: A Systems Perspective on Civil/Criminal Procedural Hybrids’ (2017) 11 CLPH 733, 748, 734–35.

108. Serious Crime Act 2015 (SCA), s 76(1)(a).

109. Ibid s 76(2)(a) and 76(2)(b)(ii). The offence also applies to family members living together but this is not relevant to the present argument.

110. SCA 2015, s 76(4)(b).

111. Ibid s 76(4)(a).

that the behaviour will have a serious effect' on the victim.¹¹² The *actus reus* requirement of 'repeatedly or continuously' engaging in behaviour stands in contrast to the requirement of a 'course of conduct' under the Protection from Harassment Act 1997. This earlier attempt by Parliament to criminalise an ongoing pattern of behaviour defined a 'course of conduct' as 'conduct on at least two occasions',¹¹³ effectively collapsing back into an incident focused model of criminal liability. Evidencing repeated and continuous behaviour for the purposes of s 76 SCA undoubtedly still requires the detailing of specific events, but this construction suggests scope for victims to provide a more naturalistic and holistic account of the relationship, rather than isolating specific events from their wider context. The creation of this offence demonstrates both the willingness and the capacity of the legislature to criminalise patterns of behaviour. Arguably, s 76 SCA could itself be used to prosecute chronic sexual violation, however there are a number of limitations to the offence that make this a poor solution.

I argued above that *conceptually* chronic sexual violation contains elements of both coercive and controlling behaviour, as well as describing a harm that results from the use of coercive and controlling tactics. However, it is unclear whether the *criminal offence* under s 76 SCA includes any form of sexual violation. As Wiener explains, the offence was positioned as 'plugging a gap' in the existing legal regime rather than overlapping with existing offences.¹¹⁴ This results in a fragmentation of the various elements of coercive control within the legal landscape, with the new offence singling out a distinct strand of 'controlling or coercive' behaviours while (non-sexual) physical violence is still expected to be dealt with under the pre-existing array of offences against the person, and sexual violation was presumably expected to be covered by the SOA.¹¹⁵ This overlooks the fact that, as explored above, chronic sexual violation includes a range of behaviours that fall outside the scope of existing sexual offences law. In contrast, the Domestic Abuse (Scotland) Act 2018 explicitly includes 'sexual violence' as a form of criminal domestic abuse,¹¹⁶ which in turn includes 'non-violent sexually abusive behaviour'.¹¹⁷ It remains unclear whether this covers only non-consensual sex (i.e. rape and sexual assault) or something more.

The above provisions relate primarily to abuse within intimate relationships. This is a key context for chronic sexual violation which I have used as a case study to develop and articulate this construct. I argue, however, that the concept of chronic sexual violation is applicable beyond coercive controlling relationships. Indeed, my intention is to draw connections between patterns of sexual abuse and exploitation in a range of scenarios and thereby resist hierarchical demarcations between 'relationship rape' and 'real rape', offering instead a framework of distinct but equally serious modes of chronic and acute sexual violation. Several recent developments in sexual offences law appear to be underpinned by an awareness that sexual violation in a variety of contexts can be cumulative. This is most apparent in relation to 'vulnerable' groups of victims: specifically children and 'mentally disordered' adults.

The Sex Offences Review, which preceded the SOA, was particularly concerned with child sexual abuse taking place over a long period of time. It stated,

The usual practice [of putting] counts on an indictment relating to specific incidents over a period of time as a way of indicating that it was part of a larger pattern of abuse . . . does not deal adequately with the pattern of abuse, especially the nature of organised and/or multiple abuse, nor does sentencing necessarily reflect that course of conduct which the specific charges were brought in to illustrate.¹¹⁸

112. Ibid s 76(1)(d).

113. Protection from Harassment Act 1997, s 7(3)(a).

114. Cassandra Wiener, 'From Social Construct to Legal Innovation: The Offence of Controlling or Coercive Behaviour in England and Wales' in Marilyn McMahon and Paul McGorrrery (eds), *Criminalising Coercive Control: Family Violence and the Criminal Law* (Springer, Berlin 2020).

115. The Court of Appeal has explicitly stated that 'the new offence targets psychological abuse' *R v Conlon (Robert Joseph)* [2017] EWCA Crim 2450 [2018] 1 Cr App R (S) 38.

116. Domestic Abuse (Scotland) Act 2018, s 2(4).

117. Explanatory Notes to Ibid para 23.

118. Home Office (n 29) [3.7.1].

In response to this problem the Review recommended an offence of ‘persistent sexual abuse of a child reflecting a course of conduct’¹¹⁹ in addition to a broad offence of ‘adult sexual abuse of a child’ which covered a range of contact and non-contact forms of sexual violation.¹²⁰

These proposals had evolved somewhat by the time the Sexual Offences Bill was introduced in January 2003, and the SOA ultimately contains a more fragmented collection of child sex offences. Offences of ‘engaging in sexual activity in the presence of a child’ and ‘causing a child to watch a sexual act’ (which includes showing the child an image of sexual activity), and the more recently added ‘sexual communication with a child’ recognise a wider array of abusive behaviour than physical contact.¹²¹ Nevertheless, the penalties available for the various child sex offences suggest a hierarchy based on physical contact and proximity and a sidelining of more diffuse patterns of manipulation and control of the victim’s sexuality. Meanwhile, offences of ‘arranging or facilitating commission of a child sexual offence’ and ‘meeting a child following sexual grooming etc.’¹²² represent both a recognition of child sexual abuse as an ongoing process, and a simultaneous fragmentation of that process. Arrangements, communications and meetings with potential victims are recognised as significant, but are treated as discrete preparatory events leading up to a potential incident of acute sexual violation. As such, these offences embody a move towards preventative criminalisation, expanding the scope for intervention and punishment well beyond the pre-existing framework of criminal attempts. Taken together, these child sex offences demonstrate an increased awareness that sexual violation extends beyond acute incidents of non-consensual contact and a legislative will to recognise this fact. However, the contrast between the broad offences proposed by the Review and the splitting up of various elements of abuse in the SOA itself reflects the practical and ethical difficulties of moving beyond the traditional incident focus of the criminal law while still delineating sufficiently clear criminal wrongs.

In addition to the child sex offences, more expansive notions of sexual violation are adopted in relation to ‘mentally disordered’ adults. I argued above that chronic sexual violation involves forms of pressure that do not appear sufficiently severe to vitiate consent when looked at in isolation (such as verbal insistence, sulking, threats to end the relationship). Sections 34–37 SOA recognise that a person with a mental disorder may be susceptible to types of inducement, threat or deception that an adult would generally be expected to withstand. The door to recognising a wider range of pressures is thus opened by assessing the individual complainant as suffering from an inherent (though not necessarily permanent) impairment. By contrast there is no legal recognition that external or relational factors such as the presence of coercive control might have an impact on the kinds of threat a person is able to resist.

A further tranche of offences prohibits sexual relationships between careworkers and mentally disordered individuals in their care. Here, the victim’s vulnerability is understood in more relational terms, foregrounding the power dynamic between the parties. Nevertheless, the offences are still predicated on the victim’s individual lack of mental capacity, hence the lack of offences tackling other adult relationships with inbuilt power disparities such as doctors or carers with *physically* ill or disabled patients, or prisoner/guard relationships, for example. In addition, these offences are still ultimately framed as instances of acute sexual violation, albeit with a greater appreciation of the context in which they take place. Through the SOA Parliament demonstrated some willingness to recognise developing power imbalances and more diffuse forms of sexual violation, but only where there is a ‘hook’ in the form of the victim’s vulnerability (understood as an inherent feature of the individual) or the taboo nature of the relationship i.e. between a sex worker and client or between blood relatives.¹²³

119. Ibid [3.7.3].

120. Ibid [3.6.4].

121. SOA 2003 ss 11, 12 and 15A.

122. Ibid ss 14 and 15.

123. Tanya Palmer, ‘State Control of Consensual Sexual Behaviour through the Sexual Offences Act 2003’ in Chris Ashford, Alan Reed and Nicola Wake (eds), *Legal Perspectives on State Power: Consent and Control* (Cambridge Scholars Publishing, Newcastle upon Tyne 2016).

In relation to sex work, the offence of ‘controlling prostitution for gain’, a course of conduct offence with a maximum penalty of seven years imprisonment,¹²⁴ again demonstrates Parliament’s willingness to expand the scope of sexual violation beyond acute instances in specific contexts but not in general, and to treat this as a less serious wrong than rape or sexual assault. This offence has, however, been interpreted broadly in ways that potentially restrict the steps sex workers can take to make their work safer, easier and less isolating.¹²⁵ The concept of chronic sexual violation may be applicable to some commercial sex contexts. Rebecca Mott, an exited prostituted woman, distinguishes prostitution from ‘isolated events of Male violence’, explaining:

Prostitution and the violence that is prostitution is repetitive—that makes [it] hard to remember individual punters, individual places, hard to know what age you were.¹²⁶

In some cases exploitation through prostitution overlaps with coercive control—as where an abusive partner coerces his victim to sell sex¹²⁷; or with the grooming and commercialised abuse of children.¹²⁸ Any exploration of how the concept of chronic sexual violation might be utilised to help articulate and address these wrongs must be led by sex worker and survivor perspectives. In particular, two important considerations must be borne in mind: First, there is a risk attached to subsuming these wrongs within a more general concept. Mott herself argues forcefully that comparing and conflating prostitution with other forms of sexual violence obscures the specific wrong of prostitution and marginalises the experiences of prostituted women.¹²⁹ Second, and in tension with Mott’s position, to class *all* experiences of selling sex as violation (chronic or otherwise), is to simplify and erase sex workers’ complex experiences of sex work as work. Moreover, where clients and brothel keepers are criminalised as the assumed perpetrators of this violation, the burdens of criminalisation are all too easily passed on to sex workers themselves and translate to reduced income and diminished power to advocate for their own safety.¹³⁰ There is scope for further research into whether and how the concept of chronic sexual violation might be useful in this context.

Familial sexual abuse is another area where chronic sexual violation is likely to be applicable, and this was again recognised to a limited extent in the development of the SOA. The Act introduced new familial child sex abuse offences in addition to renaming the existing ‘incest’ offences ‘sex with an adult relative’ and extending these to a wider range of blood relations and sexual acts.¹³¹ The rationale for retaining these offences was ‘to ensure that patterns of abuse established in childhood were not allowed to continue in adulthood’.¹³² However, the chronic nature of the abuse is marginalised in the construction of the offence which covers acute incidents of penetrative sex only, applies to both abusive and mutually desired sexual relationships, and carries a much lower maximum penalty than rape (two years as opposed to life imprisonment).

Alongside the legislature’s tentative steps to implicitly recognise some forms of chronic sexual violation, the courts have sometimes explicitly identified patterns of prolonged abuse, as illustrated

124. SOA 2003, s 53.

125. For discussion, see Palmer, ‘State Control of Consensual Sexual Behaviour’ (n 123).

126. Rebecca Mott, ‘Mind Been Away’ (*Rebecca Mott/Exited Woman’s Exploration*, 4 March 2020) <<https://rmott62.wordpress.com/2020/03/04/mind-been-away/>> accessed 23 May 2020.

127. Jonel Thaller and Andrea N Cimino, ‘The Girl Is Mine: Reframing Intimate Partner Violence and Sex Work as Intersectional Spaces of Gender-Based Violence’ (2017) 23 *Violence Against Women* 202; Sharvari Karandikar and Moisés Próspero, ‘From Client to Pimp: Male Violence against Female Sex Workers’ (2009) 25 *J. Interpers. Violence* 257.

128. Department for Education, ‘Child Sexual Exploitation: Definition and Guide for Practitioners’ (*GOV.UK*) <<https://www.gov.uk/government/publications/child-sexual-exploitation-definition-and-guide-for-practitioners>> accessed 5 August 2020.

129. Rebecca Mott, ‘Stop Comparing’ (*Rebecca Mott/Exited Woman’s Exploration*, 9 May 2016) <<https://rmott62.wordpress.com/2016/05/09/stop-comparing/>> accessed 23 May 2020.

130. Molly Smith and Juno Mac, *Revolted Prostitutes: The Fight for Sex Workers’ Rights* (Verso Books, Brooklyn 2018).

131. SOA 2003, ss 64–65.

132. Home Office (n 29) [5.8.3].

by the cases of *C*¹³³ and *Jheeta*.¹³⁴ In *R v C* the defendant, C, was charged with sexual offences against his step-daughter spanning a 20-year period. The indictment specified 18 counts illustrating the various phases of the abuse, both before and after the victim's 16th birthday. The prosecution successfully persuaded the jury that C had abused and sexually controlled the victim since she was a young child, and that this pattern had continued into her adulthood. Notably this is almost the exact situation used to justify the 'sex with an adult relative' offences, yet these were inapplicable because C was not the biological father. Instead, the post-16 incidents were charged as attempted rape and rape; the convictions were upheld on appeal. Had the court considered the post-16 counts of rape in isolation, they may have been persuaded by the affectionate and graphic text messages sent by the victim, and C's photographs of her smiling while posing naked, that she freely consented to sexual intercourse. Instead, by looking holistically at the long history of sexual abuse, control, violence and threats, the prosecution were able to explain the victim's apparent willingness as submission through fear. Indeed, like Rosa above and many others, the victim in C exercised control within the context of no control, trading her compliance to escape an even worse fate and to retain at least some sense of self-determination. Treating these instances as part of a chronic pattern of abuse also enabled the court to recognise the severity of C's wrongdoing at sentencing.

R v Jheeta is part of a recent line of case law involving 'rape-by-deception'. The defendant, J, anonymously sent a series of threatening text messages to his girlfriend, as a result of which she looked to him for support and protection. He then claimed to be liaising with the police about the threats on her behalf, and proceeded to send her further messages purporting to be from a succession of police officers investigating her case. At several points over a period of years, whenever he sensed she was losing interest in him and they were having sex less frequently, he would send messages as the police officers telling her that J was suicidal, and 'she should do her duty and take care of him'—ie sleep with him—or she would be liable for a fine.¹³⁵ *Jheeta* stands out from other deception cases as rather than using deception to procure the victim's consent, the defendant used his lies to coerce the victim. She did not experience the relevant sexual encounters as wanted and then later find out something that undermined her consent, rather she experienced the sex *at the time* as something she was being pressured into. As such it has much in common with typical coercive control cases in which the perpetrator uses gaslighting and intimidation to entrap his victim and obtain her compliance. Like other abusers, J escalated his behaviour when his girlfriend sought to end the relationship.¹³⁶

Significantly, the court in *Jheeta* did not pin down specific instances of non-consensual sex, but instead relied on J's own admission that his lies caused the complainant to have sex with him more frequently than she otherwise would have. This scenario is markedly different from the standard acute incident model of rape; it embodies a chronic pattern in which an initially consensual sexual relationship comes to be dictated by one party's wishes as to whether, when or how sex should take place. The court's willingness to look at the relationship holistically can be contrasted with the truncation and dismemberment of the complainant's narrative in *F v DPP* above. In both cases, the presence of deception was pivotal. In *F*, one very specific lie—*I will withdraw before I ejaculate*—led the court to focus in on one particular sexual encounter, framed as an acute incident of rape. In *Jheeta*, the prolonged nature of the deception opened the door to a wider view of the relationship.

These cases suggest a level of recognition among prosecutors, judges and juries that sexual violation can be chronic. However the legal framework makes it difficult to give expression to this unless the complainant falls into a legally recognised category of vulnerability or the relationship is already marked out as problematic by the presence of deception, a family relationship, or sex work. These elements act

133. *R v C* [2012] EWCA Crim 2034.

134. *R v Jheeta (Harvinder Singh)* [2007] EWCA Crim 1699 [2008] 1 WLR 2582.

135. *Ibid* [8].

136. Connie JA Beck and Chitra Raghavan, 'Intimate Partner Abuse Screening in Custody Mediation: The Importance of Assessing Coercive Control' (2010) 48 *Fam. Court Rev.* 555; Stark, *Coercive Control* (n 1) 115–16.

as a gateway to further scrutiny of the sexual relationship as a whole. I propose that if chronic sexual violation was incorporated into the legal framework, this could itself act as a gateway to a more contextualised examination of the relationship beyond acute instances of non-consensual sex. The above survey of recent legal developments suggests several different possibilities for how this could be achieved.

One approach would be for chronic sexual violation to be explicitly included within s 76 SCA. This would remove any doubt about whether the existing offence includes sexual abuse, and would clearly communicate that the relevant behaviour is not limited to the non-consensual acts already covered by rape and sexual assault law. This approach would mitigate the critique that s 76 treats controlling and coercive behaviours as a form of psychological abuse that can be addressed in isolation, as opposed to understanding coercive control as consisting of the interplay between an assemblage of physically, sexually, emotionally and financially abusive behaviours that constrains victims' liberty. Bringing together sexual violation and non-violent forms of coercion and control under one offence would partially reverse this fragmentation. Characterising chronic sexual violation as one potential aspect of coercive control may also appear to be a good 'fit' for both survivors and jurors.¹³⁷

There are, however a number of dangers to addressing chronic sexual violation via s 76. It would symbolically create precisely the distinction between sexual violation in relationships and 'real rape' that I have sought to avoid. This is particularly troubling given the large discrepancy between the maximum penalty available for s 76 (5 years imprisonment) and those for sexual assault and rape: 10 years and life imprisonment respectively.¹³⁸ Thus if chronic sexual violation were to be addressed via s 76 of the SCA, while acute forms of sexual violation continue to be addressed via ss 1–4 of the SOA, this would set up a clear hierarchy between the two which misunderstands the serious cumulative impact of the former. It could also result in acute instances of sexual violation in relationships being diverted from the SOA into the less serious SCA offence. Moreover, the coercive controlling offence would have no application in some of the other contexts I have highlighted, such as coerced prostitution, abuse of patients by medics or carers, or ongoing child abuse by an adult outside the family. Conceptually, the operation of chronic sexual violation across a range of contexts is crucial to understanding chronic and acute sexual violation as distinct but equally serious wrongs.

A bespoke offence of chronic sexual violation would be a better alternative. This could adopt the 'repeated and continuous' formulation from 76 SCA to express the chronic nature of the abuse and clearly distinguish it from sexual assault. A separate offence would identify chronic sexual violation as a distinct wrong and acknowledge its applicability across a range of intimate and non-intimate relationship contexts. Naming an offence of chronic sexual violation would help to create a shared language for this mode of sexual violation and give expression to an experience which is often marginalised both within discussions of sexual violence and domestic abuse. In defining the offence, my preference would be for a list approach similar to that adopted in relation to stalking,¹³⁹ as opposed to requiring a particular result, e.g. the requirement to demonstrate a 'serious effect' on the victim under s 76 SCA. This would serve the educative function of articulating key strands of chronic sexual violation, and would maintain a focus on the defendant's wrongdoing, rather than requiring complainants to demonstrate a particular form or degree of victimhood. The list approach does, however, raise the spectre of both over- and under-inclusivity. Moreover, caution should of course be exercised before expanding the carceral state through additional offences. The conceptual framework outlined here should thus be used as a starting point for empirical research with survivors to refine the theoretical account of chronic sexual violation, and to develop more detailed law reform proposals.

137. Leahy (n 66).

138. *Ibid.*

139. Protection from Harassment Act 1997, s 2A(3).

Alongside this, chronic sexual violation could be used to contextualise existing sexual offences. This was done implicitly in the cases of *C* and *Jheeta* above, where some understanding of the ongoing nature of the abuse appears to have informed the indictment, verdict and sentencing. Similarly, in relation to defences, chronic sexual violation could be used as coercive control was in Sally Challen's case—while not a defence itself, the concept informed the court's assessment of her loss of control plea.¹⁴⁰ Understanding chronic sexual violation should be systematically incorporated into training on the sexual offences for judges, prosecutors and police to ensure that questions of consent and reasonable belief in consent are considered through this lens where relevant. Explicit, clear guidance would ensure it is used consistently and encourage its application beyond cases involving the specific 'gateways' identified above.

Conclusion

Chronic sexual violation is a real and serious problem that operates across multiple contexts. As a new conceptual model it provides a language to articulate the experience of this distinct mode of sexual violation, which resists hierarchical constructions of 'real rape' and relationship rape. It emphasises the insidious nature of the perpetrator's wrongdoing as opposed to the victim's status as, for example, a 'battered woman', sex worker, child, or disabled person and draws attention to the multiple interconnected ways that abusers undermine victims' sexual autonomy, over and above discrete incidents of non-consensual sexual contact. The analytic framework of chronic and acute sexual violation as distinct wrongs exposes the gulf between lived experiences of sexual violation and the law's response, and provides a starting point for radically rethinking that response in order to address the whole 'wood' and not just individual 'trees'.

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140. Clare Wade, 'Coercive Control Post-Challen' [2020] *Counsel* 32.